1895

Pleadings Their History- Comparison of the Common Law and Code Systems Technicalities of the Code

Charles Bliven Mason
Cornell Law School

P L E A D I N G S.

THEIR HISTORY -

COMPARISON OF THE COMMON LAW AND CODE SYSTEMS

TECHNICALITIES OF THE CODE -

PRESENTED FOR THE DEGREE

OF

MASTER OF LAWS

June 1895

CHARLES BLIVEN MASON.

We can shut our eyes to theearliest history of society when a wrong was redressed by the physical force of the injured party or one of his retainers, and open them again on that age when a legal wrong was followed by the application of a legal remedy.

These substantive rights of life, limb, property, etc., were rights which were respected before the statutes of the different nations proclaimed that fact, for these rights rested in good common sense. As the world became more enlightened and the chiefs of the many wandering tribes began to realize their influence, they settled down and commenced to repress these broils and battles which were personally undertaken to redress an injury, or as we would now say - to punish a man for taking the law in his own hands. This was a little better than the previous stage, as in that it was a number, while here, one - the soverign, who invoked that arbitrary power or sway.

Still in the case of the soverign, he was restrained by some political power, and this tended to prepare the way for the time when the courts held sway and private redress should be done away with and replaced by the remedial power of the judicial system.

To carry out these powers, an officer at every stage of the proceedings is required. It is the bailiff who serves the "writ" or "summons;" it is the sheriff who seizes the property, or perhaps takes into custody the person; the clerk who tends to the records; the law-

yers who defend and prosecute; and the judge, who listens to the arguments and after careful analysis, renders his decision. It has been said "Remedial law is the machinery of the substantive," and this machinery is put in to motion by the issuance of this "process," "writ" or "summons," which notifys defendant of some wrong which he (plaintiff has suffered at his hands. Where the defendant answers this charge and by subsequent allegations and denials the disputed point has been reached, issue is joined. These allegations and denials are the pleadings in the case. Of course after the pleadings are all in, the verdict or decision is rendered, and this verdict or decision is then carried into effect by the issuance of the execution, which is supposed to do justice to the parties concerned.

There are two main systems of pleading, known as the Common Law or Civil pleading and that practiced under the code, while a number of jurisdictions have seen fit to combine some features of both these systems.

That system of pleading used under the Common Law, of course claims England as its birthplace, and although the State of New York is considered the mother of the code, still it must not be lost sight of that Justinian and other early legal celebrities of Rome and France have put together codes that are as ancient, and you might say, have existed contemporaneously with the Common Law. However true this may be, we will first examine the Common Law system as it has existed in

England and this country, and show how, from its many defects, dissatisfaction has arisen, which lead to this revolution in pleading and the establishment of the code.

To use the words from Heard's text-book on the subject, P.6, "Pleading is a series of alternate assertions and denials by the plaintiff and defendant of their respective grounds of action and defense; all superfluous and irrelevant matter being thrown off at each stage of this exhaustive process, till the exact point of difference,- the very apple of discord - is developed and disclosed." And when this "exact point of difference - this very apple of discord" is reached, this is the point to be tried, and whether it be one of law or one of fact, the parties are then said to be at issue. If this disputed point be one as to fact, a body of laymen - usually twelve in number - listen to the evidence of the various witnesses and render their verdict accordingly; or if the point be one of law, a judge, skilled in the nicities of legal learning, renders his decision as he thinks the argument warranted. And, as has before been said, the function of pleading is to so sift the needless matter that the exact point in issue may be given to the judge or jury for decision.

A Common Law action is begun by the serving of a "writ" on the defendant, warning him that A is about to sue; and the defendant politely tells him to go ahead and he will defend. The plaintiff then begins his proceedings in a legal form - his case. I will say here, that in the earliest history of pleadings it has been shown that these

various steps were submitted orally, and as there were no clerks who took minutes of the proceedings, the judge based his decision on what he remembered. From this one might infer that the bench of that time paid closer attention and did not try to regain their lost sleep during a session of the court. When the defendant has received this declaration of the plaintiff he may do any one of six things:

I He may admit everything contained in declaration.
II Enter a plea of abatement.
III Demur.
IV Plead the general issue.
V Admit part of the declaration and deny other parts, and contend the admitted parts do not give cause for remedy.
VI He may confess and avoid the declaration.

If he admits or fails to act the court awards damages to the plaintiff. "A plea in abatement, without admitting or denying the cause of action, sets up some matter of fact, the legal effect of which is to preclude the plaintiff from recovering upon the writ and declaration as at present framed." (Heard P51)

A demurrer means that the objecting party will not proceed with the pleading because no sufficient statement has been made on the other side, but will wait the judgment of the court whether he is bound to answer. A demurrer may be either as to substance or form. A demurrer is either <u>general</u> or <u>special</u>; the former is usually used where it is as to a matter of substance; but a special demurrer is necessary where it is as to form. A demurrer always produces as issue of law to be sent before a judge; but by demurring he admits all the facts.

But if this declaration be good in law he cannot demur, but may deny everything alleged. This is pleading the general issue and the question is immediately sent to the jury. When he is not pleading the general issue, he is said to plead specially, and the remaining two (5 & 6) are of this class. That of denying part and admitting part is so little different from that of the general issue we will not discuss it.

The plea of confession and avoidance, as its name imports, confesses all the declaration of the plaintiff but brings in newmatter to avoid being recovered against. It is easily seen that it raises no dispute but is something after the Yankee style of answering a question by asking another. It thus makes the defendant the aggressor, and both plaintiff and defendant may successively assume this role until some definite disputed question is reached. Either one of the first five pleas produces an issue, and that of confession and avoidance is the only one that postpones it. In theory this could go on indefinitely, but the point in issue is reached sooner or later. Plaintiff's pleadings are the declaration, replication, surrejoinder and surrebutter. The defendant's are the plea or bar, the rejoinder and rebutter. A certain time is allowed between the pleadings. When the point in issue is reached the plaintiff submits a copy of the ~~proceedings~~ pleadings to the judge for his guidance, and the decision and judgment follows.

We will now venture some idea of the history and growth of these pleadings from the Saxons up to the present time. We are much

indebted to the admirable thesis of Mr. S. S. Slater of the Law Class of '94, for the historical research, for many of the illustrative examples and quotations from prominent jurists and writers, which he has therein collected, and which we have taken the liberty of appropriating.

As has been said before, in the early Saxon period these pleadings were oral and each litigant had to appear and plead for himself, but after the Conquest, in the time of Granville (1185) he could, after getting into court, appoint some one to appear for him. The practice then, as it is at the present day, in all systems, was that this attorney could be dismissed if the client thought his cause was not receiving the attention it required and deserved. It is said that these pleadings were all made upon oath, thus forming a contrast to modern pleading, which need not be sworn to, although in practice they are so verified.

The Saxon was the first tongue used in pleadings, but as the conquest approached and the clergy had become a powerful factor in the nation, Latin was probably used. (Sellon 64) After William the Conqueror had won the battle of Hastings and firmly established himself on the throne of England, surrounded by the Norman nobility, along with his other substitutions of French for Saxon customs, he naturally altered the language of the pleadings, changing them from the Latin into the French. This continued to be the language until the year 1363, when it was enacted during the reign of Edward III that they be argued

in English and enrolled in Latin. Cromwell put both the argument and enrollment into English, but this act or enrollment was subsequently required to be in the Latin language.

Some years before 1272 the simple Saxon pleadings began to take on more technical forms and these technicalities began to exist apparently for the benefit of defendants. "When defendant appeared he might adjourn himself several times, then protest that the manner of the service of the writ was bad; if overruled in this he might use innumerable exceptions to the writ itself..... There were exceptions applicable to all actions, and in addition each action had exceptions of its own. Even the mere calling a man Henry when the name William was intended; misspelling a proper name; a mistake in weight, measure, color or the like, are some of the technical defects which invalidated writs." (II Bracton 213 - 219)

These mere formal technicalities of the Saxon period had begun to be done away with and as we approach the years when Edward I, sometimes known as the English Justinian, occupied the throne of England, we begin to notice the gradual advance this science has made. Stephen in his note 38 says that it was in the reign of Edward I (1272 - 1307) that pleading was first methodically ~~found~~ formed and treated as a science. During the reign of Edward II the pleadingswere oral and the judge would interrupt and make oral corrections, and when either attorney thought he was on safe ground he would rest his case.

Lord Coke once said, referring to the reign of Edward III (1327 - 1377) that "in this reign pleading grew to perfection." It was also at this time that the declaration and subsequent pleadings were beginning to be written. This age of "perfect" pleading did not survive very long, for the art began to degenerate so that the judicial mind began to prescribe rules which would restore it to its former condition. The rules that "All pleadings should be single in their allegations; that they should be consistent with each other; that each must aim for the issue; that facts must be pleaded and not evidence," are matters which are familiar to all students of "Civil Pleading." By following these rules and different constructions of them by the bench and profession, the system was made about as subtle as it was in the first place. The following is an example of a plea of this age, to use Mr. Slater's own words:

"When a man pleaded that plaintiff's house was not burnt by his negligence, he was met by the stupid quibble that this might mean that the house was not burnt at all." So in the senseless jargon of the age it was a "negative pregnant with an affirmative." (2 Reeves, Note B 219).

It is said that during this reign of Edward III that the least mistake of a clerk who made out the process, either in writing a syllable or a letter too much or too little in the record, was sufficient to make the proceedings null and void, and, as before stated, a

number of statutes were passed to get rid of these subtleties,- twelve in all.

From the time of Richard II through the reign of Henry VIII (1377 - 1547) the pleadings began to be intricate and formal, and not simple and brief as in the early Saxon times. And it is said that during the years when Henry VIII sat upon the throne, that the pleadings became so complex and obscure that they only served to retard justice rather than aid it. The technicalities of the 16th and 17th centuries were so many and the use of these pleadings so intricate, that the ordinary advocate was not capable of obtaining a hearing, and only a fewwere fully enough acquainted with the subtleties to accomplish any sort of success.

An article entitled "The Art of Modern Pleading" published in the 12th Volume of the Law Journal P 674 is interesting, as showing how these rules as framed by the courts and legislature, failed in their object and the ways in which the practitioner got around them. As to the rule that pleadings must be single, the author says: "As far as the plaintiffs were concerned this rule was easily evaded in this way: Although a plaintiff was not allowed to support one claim on two grounds he was allowed to join two or more claims in one declaration, having a separate count for each. He would surmise therefore, that he sued on two bills of exchange and say as to one bill, he presented it; as to the other, that the defendant exhonerated him from presenting it. At

trial of course he only proved one bill, but he applied that to which ever count he could support by evidence, and as to the other count he failed."

Although the Act of the British Parliament of 1852 made an end of the substance of the rule against duplicity, the form has continued. "The other feature of pleading is, that instead of the actual facts being stated, the legal results or implications from them are stated as facts." "As for instance, the defendant is said to break and enter the plaintiff's ~~house~~ close if he gives a warrant to distrain to a broker who enters for that purpose. So if a man turns his wife out of doors and without means of support, goods supplied to her are said to be sold and delivered to him, because she had an implied authority to bind him." After giving numerous other specific examples, he continues: "I will now point out the mischiefs resulting from this last mentioned matter. In the first place it causes pleading to fail in their very objects. They do not state facts so as to inform the opposite party nor evolve the matter in dispute. It is said that the former objection is removed by giving particulars, but the proper object of particulars is to particularize, not to state facts. But the latter objection remains in full force. The pleadings do not evolve what ~~was~~ is in dispute as matter of fact or matter of law." The remainder of the discussion is the pointing out of the frailties and weaknesses of the Common Law system, and how these could be remedied by the Code Procedure.

Writers on this subject, and even those who are adherents to Common Law pleading, are free in saying that this system, more than any other, affords a means for chicanery and fraud. It was Lord Mansfield who said that there were very few lawyers who knew its subtleties, and where they were not known, were used as instruments of chicane. From a perusal of the previous pages it is readily seen that more attention was given to the former than the substance of the pleading. The following words taken from the opinion in the case of Forsyth vs Wells 41 P. St. 291, express the present idea of pleadings: "We may not sacrifice the principle to the very form by which we are endeavoring to enforce it. Principles can never be realized without forms, and they are often inevitably embarassed by unfitting ones; but still the fact thatthe form is for the sake of the principles, and not the principles for the form, require that the form shall serve, not rule, the principle, and must be adapted to its office."

We have thus seen that the Spring of Justice was often clogged at its very source, and then it was only by hard digging or a lucky leak through the obstruction that the question could emerge into this stream of litigation and a decision reached.

Lord Hale thus concisely stated the condition of pleading at its various stages: -- Originally, pleadings werevery plain and concise, but in progress of time, pleaders, yea and judges too, became too curious in them, so that the art and dexterity of pleading which in its

use, nature and design was only to render the fact plain and intelligible and to bring the matter to judgment with convenient certainty, began to degenerate from its primitive simplicity and true use and end in a piece of nicety and curiousity, which how it hath improved therein in later times, the length of the pleadings, the many unnecessary repetitions and the many miscarriages of causes upon small and trivial objections, do but too sufficiently testify."

In the reign of Henry VIII and down through the succeeding ones to the present day, statutes have been passed which have to some extent modified these pleadings, by striking out some and creating fictions to get around others. Also the courts have had some hand in reforming the pleadings, as for example,- doing away with all formal matters. During the middle of this century when the English government was trying in this way to smooth over the rough surface of her pleading system, New York applied the treatment which might be likened to the use of the knife by the surgeon, and cuts away the entire diseased member, and puts in its place one that can perform its functions in a better manner. The result of this operation was the doing away with the Common Law system of pleading and the establishment of the Code of Civil Procedure. As a result of this reform in New York, England greatly modified her system of pleadings in the year 1873 by the passage of the Judicature Act.

It is a fact well known to all students of the law that when the early settlers of New York State saw fit to establish a government

and judicial system, they adopted such laws and rules of the mother country as would fit the temperament and surroundings of the infant state; and so the same net work of intricate forms which had been bothering the bench and hampering justice in Merry England, were necessarily introduced into the courts of the Empire State. Nor were the evils which had accompanied them in the Old World discarded when the system was introduced in the New. The same distinction between law and equity here existed, the same objectionable forms were used and the same unsatisfactory results were obtained. Although but an infant, New York was very precocious and her men of thought and action could not long endure these evils without some attempt to remedy them. Expressions of dissatisfaction were heard on all sides and these feelings gave place to action. Experience has shown and history has demonstrated that with an increase of industry where competitors are many, all eager to get to the front, they can't but help infringing on each others rights, consequently causing much litigation. This was the condition of New York in the early years of this century, the courts being crowded with suitors who seemed unable to get a hearing. The legislatures made amendments to facilitate the hearing of causes and in 1823 a new constitution went into effect. This was thought to have remedied the previously existing defects, but in about two years this new constitution was deemed as bad as the old. It was about this time that David Dudley Field came into the arena of public notice as a cham-

pion of Code Procedure. In 1847 a new constitution, which had been asked for by the people, was adopted, and during all this time Mr. Field had not been idle. In many phamplets he had urged the adoption of his hobby. He stated his proposed reform in the following language:

"It is proposed that the complaint (the declaration) shall set forth briefly, in ordinary language, and without repetition, the nature and particulars of the cause of action; and that the plaintiff or his attorney shall make oath to his belief of its truth. To this, the defendant is to put in his answer, setting forth briefly, and in ordinary language, and without repetition, the nature and particulars of his defense, to be verified in the same way." He proposed an amalgamation of procedure in suits in law and in equity. Speaking of these two early systems of pleading he said - "The distinction between the two classes of cases is now merely a distinction in the forms of proceeding. The Court of Chancery has existed only in consequence of the narrow and fixed forms of the common law. If those forms had been abolished and a natural procedure adopted, the course of the two courts would long ago have been assimilated." "The Common Law prohibits the assignment of a thing in action. Equity allows it." The courts of law require the suit to be brought in the name of the assignor but they try to protect the assignee and if they sue in equity in the name of the assignee, he is thrown out of court. "This," says Field,"is good law but the reason is bad," and the sooner the distinction between

these courts in a case of this kind is made, that the suit can be instituted in the name of the real party in interest, the better it will be for the cause of justice. Somewhere in his many tracts he discussed the difficulty of fixing in all cases the limits of the respective jurisdictions of Law and Equity, and of the frequent necessity of going through both courts to determine one controversy, and cited as illustrative the well known New York Assessment cases. The legislature was finally persuaded to appoint a committee whose duty it was to provide for the abolition of the present forms of action and pleading; for a uniform course of proceedings in all cases, whether of legal or equitable cognizance; and for the abandonment of every form and proceeding not necessary to ascertain or preserve the rights of the parties.

These directions to the committee, composed of seventy-three able lawyers, contained the sentiments of Field himself. But although Field had been championing the cause, he was not at first named as one of the committee. Mr. Nicholas Hill of Albany, one of three, not able to agree with his two associates, resigned, and Mr. Field was appointed to fill the vacancy. He enthused new spirit into the undertaking and at the close of the year 1849, a little over eighteen months of work, the committee had completed their labors.

The way in which the new code was received by the people and especially by the representatives of the bar, is well shown by the words of Mr. Field (7 Alb. L.J. 193)

"The new system was a complete overthrow of the old. Nothing of the kind hadever before been attempted. It shocked the theories and prejudices of the profession, hardened by the incrustation of centuries. No wonder that it was received with amazement at the audacity of proposing it, with scorn for the reasoning with which it was supported, and with hate for its destruction of the learning of so many lifetimes. No wonder that lawyers scoffed at it and judges rebuked it... We boast justly that we have inherited from our fathers that English law which proclaims and enforces the rights of men. Let us give ourselves cause to boast also that we have enriched the great inheritance." And further lauding New York as the pioneer in this movement, he closes with these words: "She struck the blow that broke in pieces the unnatural, cumberous and oppressive procedure which had hardened through ages."

Field throughout his life did not allow modesty to prevent him from taking the most of the credit of this reform, and he opposed as best he could, every effort of the legislature to alter his code in any way. It was openly proclaimed at a session of the New York Bar Association, that his every movement was hostile to a reconstruction of the code by Throop, and although he claimed to be a friend of the reform, he was in fact its enemy. Passing by these personal disputes, it is sufficient to say that Throop did reform the code, being the one now in use; of course, altered by the amendments which have taken place from year to year.

In the preceding pages, the history of the Common Law and Code pleading we think has been substantially given. The defects which the code has sought to remedy have been touched upon and we will now pass to a closer study of those sections of the code which relate to pleadings. We will not pretend to treat these sections in a logical manner but will take them up in the order they come.

Pleadings, whether underthe Code or Common Law system are defined as the formal written allegations of the parties of their respective claims and defenses, and their object is to make known to the court the real matter in controversy, to apprise each party of the grounds of claim or defense put forward by the other, and to make apparent by the record what controversy has been litigated and concluded by the judgment in the action. It is needless to say that pleadings should be in writing, subscribed by the party or attorney, and then filed. "While the codes expressly abrogate the formalities of the older systems of pleading and the rules by which their sufficiency is determined, the objects and essential principles are the same in all systems." The code has abolished "fictions" and provided a uniform system. Common law rules of pleading are abrogated and where they are applied under the code system, it is because they are expressly enacted or necessarily implied from the language of the statute. Bryant in his work on Code Pleading says,- "From many decisions under the code, referring to and following the old rules of pleading, it might be inferredthat they are still in force; but when followed it is because they inhere in the

new system, not that they are in force as the old rules."

Chapter VI of the N. Y. Code is devoted to Pleadings in Courts of Record. This chapter is divided into two titles; the first namingand explaining the consecutive pleadings in an action, while the second pertains to provisions generally applicable to pleadings. The pleadings under the code are the (1) complaint, (2) demurrer, (3) answer, (4) reply, whether it be in New York or any other state having the same system. To usethe words of the first section (478) of this chapter - "The first pleading on the part of the plaintiff is the complaint although in some states it is known as the petition. It corresponds to the declaration of Common Law and to the "bill"in Equity. Sections 479-80 direct when a copy of the complaint is to be served and what the consequence of a failure to do so would be. Then follows 481, and states what the complaint is to contain. It has been held that if no court is named in the summons or complaint it is a nullity (Ward vs Stringham C.R. 118), but that if inserted in the summons, its omission in the complaint would be disregarded. (9 How. 198). The names of the parties must bestated, and in what capacity, whether as individuals, partners, or as a corporation. (2) It must contain "a plain and concise statement of the facts, constituting each cause of action, without unnecessary repetition." This means plain English language, avoiding all superfluous and redundant allegations, and stating only those facts that are material. Many of the minuter rules of Common Law Pleading

are applicable to that of the code, as (a) State the facts, not the evidence of the facts. (b) State facts, not mere conclusions of law, although the codes permit conclusions of law to be alleged ina few instances. (c) Do not state facts which are necessarily implied. (d)Do not state facts of which the court takes judicial notice, and as to matters of which the court takes judicial notice, consult works of evidence. (e) State facts as they occurred, rather than according to their legal effect, although many authorities under the code say it is proper to state them this way. (f) Pleadings should not be double. Duplicity under the code is the jumbling of two or more causes of action or defenses into one account or statement. (g) Do not anticipate defenses. This was allowed in Equity, but forbidden by the Common Law Then there are the numerous rules tending to certainty of issue, those tending to prevent obscurity, confusion and prolixity. At Common Law the declaration must " lay damages" and under the Code it is also necessary to allege them. The complaint must contain a demand ofthe judgment to which the plaintiff supposes himself entitled. If a recovery of money be demanded, the amount thereof shall be stated. This demand should be explicit and is usually for money only. It may be a demand for alternative relief, or for two kinds, but they must be consistent with each other. And even in an action of equitable character, the court will give the full relief to which the facts alleged and the case entitle the plaintiff, though the relief may be of a legal nature.

Section 484 specifies what causes of action may be united in the same complaint, and the decisions under it are many. Teall vs City of Syracuse 32 Hun. 332, held that an action for wrongfully converting property by means of a wrongful seizure and sale thereof could not be united in the same complaint with one for the proceeds of the sale of the property. The case of Lamming vs Galusha 135 N.Y. 239, decides that an equitable action for an injunction and one for personal injuries arising out of the same transaction, i.e., the keeping of a boiler and engine in front ofhis premises, can be united in the same complaint. We will not take the time or space to go over the various decisions under this section but will pass to a discussion of the next pleading - the demurrer.

The demurrer admits the facts to be true, but under the code system only for the purpose of testing their legal sufficiency, but claims they are insufficient in law. The scope of the demurrer of the code is somewhat different than that of the common law system. It reaches to objections,to jurisdiction, to disabilities of person and to defect of parties, which are met at common law and in equity pleading by pleas in abatement. This, or the answer, is the only pleading on the part of the defendant and section 488 of the code lays down eight objections in a complaint that may be demurred to. But in case the defendant sets up a counter claim or a defense consisting of new matter, the plaintiff may demur to it if on its face it is insufficient in law. (R 494)

Section 495 gives the grounds on which the plaintiff can demur to a counterclaim of defendant. It may be well to say here that the special demurrer for imformality is abrogated, and many defects of a pleading which were formerly ground for special demurrer at law, or exception in equity, are, by the codes, reached by motion to make more definite and certain, or to strike out, or they are disregarded. It is well to bear in mind the following fundamental rules when demurring under the code:

(1) The demurrer may be to the whole complaint or to any one or more of the several causes of action stated therein, but if it is made to the whole pleading it will be overruled, if any of the causes of action therein are good. (2) It must reach the whole of a cause of action. (3) Where two or more defendants jointly demur, the demurrer is bad if a cause of action is stated against any one of them, though not against all. (4) The demurrant cannot answer and demur to the same matter. (5) The demurrer admits the facts. (6) The demurrer reaches back to the first fault, i.e., upon the argument of the demurrer the court will examine the whole record or series of pleadings and give judgment against the party who was first defective in his pleading

If the defendant can find no grounds under the code by which he can demur, he must "answer." This pleading takes the place of the common law "plea" and of the "answer" in the equity system, but it goes farther than either of these in that it permits the defendant to set up or plead a "counterclaim," i.e., an independent cause of action exist-

ing in his own favor against the plaintiff, by which to diminish, balance off, or exceed the plaintiff's cause of action, and thereby show himself entitled to affirmative relief. Sections 500-1 provide what the answer shall contain, and contrary to the old system they defendant may plead several defenses or counterclaims. The denial may beeither general or specific, and there are many rules by which the defendant should be guided in framing them. The test proposition whether a counterclaim will be sufficient to be sustained or not, is whether it could have been instituted as a separate cause of action. The following cases will give some idea of what the courts consider valid counterclaims and what they do not: In O'Brien vs Garniss 25 Hun. 446, the action was for the construction of a will and the validity of the trust under which the defendant assumed to act. The counterclaim sought to establish the trust and compel an accounting of the money, which as devisee, under the will, the plaintiff had collected from the trust estate. This was held a good counter-claim. In the case of Barnes vs Gilmore 6 Civ. Pro. Rep. 286, the question as to a mortgage was involved, and the defendant set up as a counter-claim an amount of rent due when he held under the deed of such property, and it was deemed a good counter-claim. Under the following circumstances the counterclaim was considered sufficient:- An action was brought to foreclose a mortgage and the defendant demanded affirmative relief by way of its foreclosure and a sale of the premises and property covered by it. In

this alleged claim of the defendant he embraced both a cause of action against the plaintiff and against his co-defendant. (Met. Trust Co. vs R. R. Co. 43 Hun. 521). The case of Driscoll vs Sanderson 15 N. Y. State Rep. 134, furnishes an example of a counter-claim that was not considered sufficient. Plaintiff sued for commissions and defendant set up against it that the plaintiff had misrepresented some Brooklyn property which she had exchanged for other land, situated in Scranton, Pa. It was not alleged however in the answer that the property exchanged by her for the Brooklyn lots was the same property or any part of it referred to in the complaint, neither was it stated that this exchange of property was in any way connected with the transactions in the complaint; neither was it stated that the plaintiff had violated any contract with the defendant and as his action was wholly on contract the effect of the omission of these allegations was to excludehher claim as a counter-claim in the action. Linman vs Iron Works 128 N.Y. 58, in which Judge French delivers the opinion, and Rothschild vs Whitman 132 N.Y. 148, are two Court of Appeal cases in which the counter-claims were considered bad. The case of Maders vs Lawrence 49 Hun. 360, presents a statement of facts in which two men traded horses and the defendant gave his promissory note for the difference in the value of the two and the plaintiff now brings an action on this note, and defendant sets up a breach of warranty and the court held that as the giving of the promissorynote constituted but part of the transaction

the breach of warranty was rightfully pleaded, but by way of dicta they say it would have been different if the defendant had commenced an action based upon the warranty, for as six years had elapsed the statute of limitations would have been a bar.

The next pleading in order is the "reply" and except in a few code states where it is not embraced in the series of pleadings it is necessary to be used on the part of the plaintiff when the answer sets up a counter-claim, properly pleaded, and unless this counter-claim is replied to, it is admitted. This reply must be consistent with the allegations of his complaint. Section 514 of the code is the beginning of the article devoted to the reply and under this section it has been decided that a reply which denies the allegations of the counter-claim, does not by setting up new matter in avoidance of it, admit those allegations. The case of Jordan vs Bank 74 N.Y. 467, holds that when an answer sets up a counter-claim to which there is no reply, but the trial of the action proceeds as if every matter contested by the parties was at issue, and no point is raised that the counter-claim is admitted, it cannot be taken on appeal. An unnecessary reply will be stricken out on motion of the defendant. Dillon vs R. R. 14 J. & S. 21, Devlin vs Bevins 22 Howard 290, Gilbert vs Cram 12 How. 455. This first citation is also authority for saying sections 516 and 517 should be construed together. A reply to an amended answer is not necessary where the original answer has been replied to, and the amended answer sets up no new issuable facts requiring a reply. Leslis vs Leslis

The following cases are illustrative of the instances in which the court has or has not directed the plaintiff to reply to the new matter which is set up constituting a defense by way of avoidance. In the case of Hubbell vs Fowler 1 Abbt. (N.S.) 1, an answer had been put in interposing the statute of limitations and a reply thereto was ordered. It will be perceived that the defense admitted the plaintiff's cause of action, but sought to avoid the same by reason of the statute. In the case of Brinckerhoff vs Brinckerhoff 8 Abbt. N. Cases 207, the action was for dower, and the defendant alleged that the deceased had been divorced from the plaintiff. The plaintiff was then ordered to reply, because it was quite apparent that the defendant was entitled to be appraised of the way in which the plaintiff proposed to avoid and overcome the decree of divorce. Poillon vs Lawrence 77 N.Y. 207, arose on an answer pleading a discharge in bankruptcy.

This ends our discussion of the different pleadings which may arise in an action under the code, and we are as fully aware of its shortcomings as is the reader. We can simply say that these pages convey but vaguely the amount of work undergone in their preparation.

The second title of Chapter VI contains the remaining provisions of the code applicable to pleadings. The sections included (518-546) have been the subject of much litigation, and the courts both high and low have given them a construction. "This chapter prescribes the form of pleadings in an action, and the rules by which the suffi-

ciency thereof is determined, except where special provision is otherwise made by law." The rules of "profert and oyer" have no longer any application, and other technicalities of the old system are abrogated. Sections 1775-76 are in relation to pleadings where one of the parties is a corporation; we will not however, enter into a discussion of them. All these pleadings must be liberally construed with a view to substantial justice between the parties, and this applies only to matters of form. (Clark vs Dillon 97 N.Y. 370). See also 81 N.Y. 296, 88 N.Y. 37, 7 N.Y. 476, and other citations of the annotated codes, and one can arrive at the idea the courts have of liberality of construction.

It has been ofttimes decided that dates are flexible in pleading and variances may be disregarded, except perhaps in divorce. Schiller vs Mallbie 11 Civ. Pro. Rep. 304, decides that both the subscription and the indorsement of an attorney are required, and neither alone is sufficient. In the case of Durham vs Lee 47 N.Y. Sup. Ct. 174, section 521 was involved and the court said: "These sections (521 and 1204) are not to be limited by mere construction to actions of foreclosure, partition, and similar actions of a purely equitable character, for the great feature of that code is, that but a single form of action is provided for the enforcement of all private rights, and that a defendant may set forth in his answer, as many defenses or counter-claims, or both, as he has, whether they are such as were formerly denominated legal or equitable." Under R 523 it was held that a want of a verification to a complaint constituted no objection as it

was not "a subsequent pleading" within the meaning of the section. Judge French delivered the opinion in the case of Rogers vs Decker 131 N.Y. 490, where it was held that an action to enforce the liability of a trustee was not a penal action and so the defendant was not excused from putting in a verified answer where the complaint was verified. In regard to ℞524 Judge Andrews in the case of Bennett vs M'f'g Co. 110 N.Y. 152, uses the following language: "It assumes that when a party has no personal knowledge an averment or denial may be made upon information and belief, and treats every positive averment or denial as having been made on personal knowledge, and declares in substance that it is to be so regarded in criminal prosecutions."

Under ℞525 an attorney of a corporation has been held to be an officer thereof, capable of verifying (133 N.Y. 270) and also a "general manager" whose duties are not specified can also verify. (15 Civ. Pro. Rep. 359), but the same decision is authority for saying that an ex-officer is not an officer of the corporation with the meaning of the section. The phrase, "knows the contents thereof and that the same are true" held equal to saying that they are true to the knowledge of deponent, and so is a substantial compliance with 526 (94 N.Y. 574). "The object of requiring notice (says the court in Kantz vs Kuhn 9 Daly 166) is to enable the party in default to apply for leave to supply the omission." This was decided in connection with 528. Section 529 is aimed solely at fraudulent transfers and the like, but in other actions in which the defendant is charged with crimes or misdemeanors, he may

serve his answer unverified (6 Civ. Pro. 30). In ordinary language the word account is applied to almost every claim or contract which consists of several items, and there is no necessity for giving any limited meaning to the word as it is used under section 531 (27 Hun 515). Where an administrator sued for his compensation and he was asked to hand in a bill of particulars, it was held it did not come under this section (4 Civ. Pro. 403), and if the account furnished contains only the debit side, and not the credit, he can be made to furnish another full account. (8 N.Y. St. Rep. 894). "The design of 532 was evidently to dispense with the necessity of compliance with the common law rule, which requires a statement of facts and circumstances showing a right to exercise jurisdiction and thus to abbreviate pleadings. The provision mentioned does not however dispense with the necessary proof to establish the jurisdiction of a court of limited power." (15 N.Y. St. Rep. 316), and it is sufficient if the facts impliedly allege jurisdiction (114 N.Y. 518). Hatfield vs Lasher 81 N.Y. 246 is authority for saying that section 535 simply changes the rules of pleading and not as to the admissability of evidance; and in the case of Spooner vs Keeler 51 N.Y. 538, Judge Reynolds gives a good idea of the intent of the section; he says, "Under the system of pleading prevailing prior to the adoption of the Code of Procedure, the defense of an action of libel an slander was a very perilous undertaking. If the defendant attempted to justify by proving the truth of the words spoken, it was regarded as a reiteration of the charge and conclusive evidence of malice, and no

evidence in mitigation could be received. If he failed to establish the truth of the charge the damages were aggravated. He might give evidence in mitigation but in that case he must admit the truth of the charge, and could give no evidence tending to prove the contraty. He could only give evidence to show that he had reason to believe the charge was true when made. It was obviously intended by the code to remedy this evil and I think it has done so." The case of Cook vs Rief 8 Civ. Pro. 133 is distinguishable from that of Fleishman vs Bennett 87 N.Y. 237, although both seemingly to be decided on the same point. Judge Follett in Kruikshank vs Gordon 118 N.Y. 186 gives utterance to the following: "The authorization by the code of pleas in mitigation is not a license for their interposition in bad faith, and for the purpose of injuring the reputation of the plaintiff, and when they are interposed for that purpose, the fact may be considered by the jury." Since the adoption of section 537 of the code, the plaintiff can no longer treat an answer as a nullity and enter a judgment as upon default; his only remedy is to apply to the court or judge, upon notice, as prescribed in this section. And under this section full five days notice must be given. The case of Singleton vs Thornton 9 N.Y. State Rep. 600 contains a good example of a frivolous pleading. The action was upon a promissory note and the defendants demurred to the complaint because it was not alleged they were partners, or that the name of "Thornton or Dobbins" is a firm or other name, and that title in the plaintiff is not alleged. In Spies vs Roberts 50 N.Y. Sup. Ct. 301

the judge held the defect in the answer did not affect the substantial rights of the parties, and so they could be disregarded.

Section 542 has been the source of considerable litigation. Where the first amendment to the complaint is compelled by order of court, plaintiff may amend the complaint a second time, of course, and without costs. The case of Robstolli vs Noxon 5 N.Y. Supp. 315, held that a demurrer may be regarded as an answer within the meaning of that section, but the majority of decisions hold with the decision of Cashman vs Reynolds 31 N.Y. St. Rep. 143, decided in another department in which the court says: "A demurrer is not an answer in any legal sense and cannot be amended as of course under ₱542, by the service of an answer," for sections 488, 499, 963 and 966 show that an answer and demurrer are distinct and different pleadings, as they raise issues of an entirely different nature. This decision of Cashman vs Reynolds was affirmed by the court of last resort. The case of ~~Spicer~~ Spear vs Mayor 72 N.Y. 444, interprets section 544 in this language: "The power of the court to which a motion is made for leave to put in a supplemental answer, is no more, or is it any less now than it was before the present code. It has a discretion to permit or refuse a supplemental pleading, but that discretion must be exercised reasonably and not capriciously or wilfully." A supplemental complaint should not be allowed upon an ex-parte application (79 N.Y. 579 and 59 N.Y. 233). A supplemental complaint under the code is not a substitute for the orig-

inal complaint but a further complaint, and it assumes that the original complaint is to stand (35 Hun. 553). In connection with section 546 is rule 22 which requires that motions to strike out any of the pleading matter for being indefinite, etc., must be noticed before demurring or answering the pleading, and within twenty days from the service thereof (Brooks vs Hanchett 36 Hun.70).

This finishes a review of these sections, and along with cases which we have noticed for illustration, there are many other decisions holding the same way. This thesis has been more of a digest than a critical review of the sections of the Code of Civil Procedure.

Chas B. Mason